

SPIEGEL



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Howard Johnson Motel

File: B-234668

Date: June 30, 1989

DIGEST

1. Protester is an interested party with standing under General Accounting Office Bid Protest Regulations, since protester would be in line for award were its protest to be sustained on the basis that low bidder and second lowest bidder are ineligible for award because they are not small businesses.
2. Procuring agency may make award under total small business set-aside, notwithstanding size status protest pending before Small Business Administration, where contracting officer has made reasonable determination that government needs will not permit delay in contract award.
3. Protest that scheduling bid opening only 5 days before contract commencement was to begin was prejudicial to protester is untimely where not filed before bid opening.

DECISION

Lodging Consultants, Inc., as agent for the Howard Johnson Motel Corporation (Howard Johnson), protests the award made to the Quality Inn, under U.S. Army Garrison Headquarters' invitation for bids (IFB) No. DAKF27-89-B-5006, a small business set-aside for providing meals, lodging and transportation to Army personnel at the Military Entrance Processing Station in Wilkes-Barre, Pennsylvania, from March 1, 1989, to February 28, 1990. The Army received bids from the incumbent, Quality Inn, and the Inn at Market Street Square (Market Street), as well as from Howard Johnson. Howard Johnson contends that Quality Inn and Market Street are large businesses ineligible for award under a small business set-aside.

We deny the protest in part and dismiss it in part.

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The Army contends that Howard Johnson lacks standing as an interested party because it would not be in line for award even were its protest sustained. Under our Bid Protest Regulations, an interested party is a prospective or actual bidder (or offeror) whose economic interests would be directly affected by a contract award decision and a contractor must fit within that definition in order to pursue a bid protest at the General Accounting Office. 4 C.F.R. §§ 21.0(a), 21.1(a) (1988). Since it challenged the size status of both Quality Inn and Market Street, Howard Johnson would be in line for award if its protest were sustained and it is therefore an interested party. See Gel Systems, Inc., B-233826, Jan. 10, 1989, 89-1 CPD ¶ 26.

At bid opening on February 24, 1989, Quality Inn was the low bidder, Market Street was second low and Howard Johnson was third. Howard Johnson protested to the contracting officer by letter of February 24, that Quality Inn and Market Street were not small businesses. On February 28, the contracting officer forwarded Howard Johnson's size-status protests to the Small Business Administration (SBA). On that same day, the Army awarded the contract to Quality Inn, "in the public interest." While conceding that the Army would have been within its rights to extend the incumbent's contract pending a determination by the SBA, Howard Johnson claims that the Army's requirements for food, housing and transportation services during the interim did not necessitate the awarding of the contract to the incumbent. The Army responds that it was compelled to make the award prior to SBA's review because of the necessity to maintain uninterrupted service. Howard Johnson protested here on March 2.

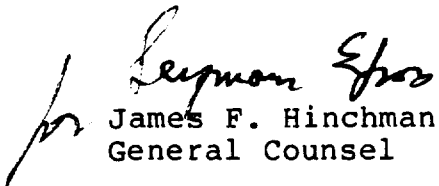
Federal Acquisition Regulation (FAR) § 19.302(h)(1) provides that a contract may not be awarded following the referral of a size protest to the SBA, until there has been a resolution by the SBA or 10 working days have elapsed without a resolution, or the contracting officer has made a written determination that an award must be made "in the public interest." The contracting officer made a determination that the public interest required an uninterrupted supply of food, lodging and transportation for incoming personnel. The question, therefore, is whether the contracting officer was justified in making such a determination.

Determinations of urgency are generally left to procuring agencies, because they are usually in the best position to know their minimum needs. A protester bears the burden of proving unreasonable an agency's assessment of its own needs and we are unaware of any requirement which would oblige a procuring agency to extend an expiring agreement rather than award a new contract for the purpose of alleviating a public

interest exigency. Superior Eng'g and Elecs., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698. Since Howard Johnson has failed to demonstrate that the contracting officer's public interest determination was unreasonable, SBA's subsequent finding that Quality Inn is a large business, and any similar finding with respect to Market Street, has only prospective application. Priscidon Enters., Inc., B-230035, Mar. 18, 1988, 87-1 CPD ¶ 290.

Howard Johnson claims also that it was prejudiced by the Army's timetable which scheduled bid opening only 5 days before contract commencement, thereby requiring an award before the SBA's 10-day waiting period expired. Our Regulations require that protests against alleged solicitation improprieties be protested prior to the bid opening date. 4 C.F.R. § 21.2(a)(1). Here, Howard Johnson knew from the solicitation the bid opening date and the proposed contract start date. Since Howard Johnson did not protest the time frame before bid opening, but only after contract award, this allegation is untimely and will not be considered on its merits.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel